***United States Court of Appeals***

***for the Second Circuit***

# INTERVENOR'S REPLY BRIEF

74 [redacted]1283

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Bpls

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| NATIONAL ASSOCIATION OF INDEPENDENT TELEVISION PRODUCERS AND DISTRIBUTORS, Petitioner, -v- FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Respondents. | ) | Case No. 74-1168 |
| WESTINGHOUSE BROADCASTING COMPANY, INC., Petitioner, -v- FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, Respondents. | ) | Case No. 74-1283 |

# ANSWERING BRIEF OF INTERVENORS NATIONAL COMMITTEE OF INDEPENDENT TELEVISION PRODUCERS, SAMUEL GOLDWYN PRODUCTIONS, WARNER BROS. INC., COLUMBIA PICTURES INDUSTRIES, INC., AND MCA, INC.


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## Preliminary Statement

Intervenors National Committee of Independent Television Producers (NCITP), Samuel Goldwyn Productions (Goldwyn), Warner Bros. Inc. (Warner), Columbia Pictures Industries, Inc. (Columbia) and MCA, Inc. (MCA) submit this brief in answer to the briefs of petitioners National Association of Independent Television Producers and Distributors (NAITPD) and Westinghouse Broadcasting Company, Inc. (Westinghouse) and intervenor Time-Life Films Inc. (Time-Life). NAITPD and Westinghouse seek to invalidate certain modifications in the prime time access rule (PTAR) ordered by the Federal Communications Commission's Report and Order of February 6, 1974 (JA 51-179)* and to restore the original rule. Time-Life repeats a request for a stay of the modified rule denied once by this Court and twice by the FCC.

In addition to the above-captioned proceedings, Warner and Columbia filed separate petitions for review (Docket No. 74-1348) seeking total repeal of the basic rule in its

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*"JA" refers to the joint appendix of Westinghouse and NAITPD.

entirety rather than its modifications. NCITP, Goldwyn and MCA intervened in that proceeding and joined in the request for an invalidation of the entire rule. Warner, Columbia, NCITP and Goldwyn filed their principal brief in that appeal on March 28, 1974 (hereinafter referred to as "the principal brief"). MCA filed a separate brief. Since the principal brief sets forth the facts and prior proceedings, we shall not repeat that background material here.

The Parties

Intervenor NCITP is a group of more than 75 individual independent television producers who have created many of television's most successful programs.* Goldwyn operates a film studio for rental to independent producers of motion pictures and television programs who, like NCITP's members, lack their own studio facilities. Warner, Columbia and MCA, which own studio and distribution facilities, produce and distribute television programs and motion pictures. They have also produced some of the nation's most popular television programs.

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* Those individuals are listed in the Appendix filed by Warner and Columbia in connection with their appeal in Docket No. 74-1348 at A151-54. (All references to "A", followed by the appropriate page numbers, are to that Appendix.) Programs produced by NCITP's members include All In The Family, Sanford & Son, The Waltons, Hallmark Hall of Fame, The FBI and The Mary Tyler Moore Show.

Petitioner NAITPD, in contrast, is a group of 13 producers and distributors who primarily specialize in making game shows for the networks and replications of old or current network game shows for access time periods under PTAR. Petitioner Westinghouse is the nation's largest affiliated television station owner other than the three networks.* It originally conceived the concept of PTAR and promised the FCC and this Court in Mt. Mansfield Television Inc. v. F.C.C., 442 F.2d 470 (2d Cir. 1971) that it would produce diverse programs for access time, but discontinued such production because stations preferred games and other inexpensive fare. Time-Life is basically an importer of foreign programs, only one of which appeared with any frequency in access periods.**

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* Westinghouse owns network affiliated stations in Baltimore (ABC), Boston (NBC), Philadelphia (NBC), Pittsburgh (CBS) and San Francisco (CBS).

** Time-Life's brief is solely devoted to seeking a one-year stay of the revised PTAR. But this request was denied once by this Court and twice by the FCC. No reasons are advanced to re-litigate the issue a fourth time. Time-Life is a latecomer to PTAR, not having access shows prior to 1973-74 or participating in the current rule-making proceeding. While Time-Life's present brief contains a list of programs, it does not claim that any, except a foreign animal show ("Wild, Wild World of Animals"), was used in access time. Time-Life imports programs produced abroad by a foreign network that were not stimulated by PTAR. (See Exhibits to Time-Life's Motion to Intervene and for a Stay, March 5, 1974.) To the extent some of these programs have been televised here, they have basically been presented on networks or in non-access periods. Prior to its belated participation in these proceedings, Time-Life's principal involvement was to seek waivers from, rather than support for, PTAR. See, e.g.,

[footnote continued]

Summary of Positions

Petitioners, while not defending PTAR's three-year track record, object to some of the FCC's recent modifications designed to relax the rule slightly. Wholly apart from the specious nature of their claims, it is improper and indeed impossible to focus attack solely on certain central parts of an integrated rule. Clearly, the FCC would have voted to repeal the entire rule, in light of its dismal record, had not a slender majority of Commissioners hoped that these modifications might alleviate the situation. The FCC thus adopted an integrated new rule as part of a compromise package. Petitioners cannot now single out for attack the particular changes they believe to be inimical to their private economic interests while ignoring the legality of the compromise package as a whole.

In contrast to petitioners, we have in our appeal analyzed the complete rule and all of its component parts -- the entire seamless web spun by the Commission -- and demonstrated that total repeal of the integrated rule is required under the

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[footnote continued]

Time Life Films, 35 FCC 2d 773. Time-Life's present speculative claims of injury from denial of a stay is belied by its letter to the FCC of November 19, 1973 (SA 35), shortly before the FCC's Public Notice of November 29, 1973 announcing changes in PTAR, and by the fact that its shows had already been produced by a foreign network and were not created in reliance on PTAR.

standards of Mt. Mansfield, Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973), Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969), and other controlling authorities. While three years ago in Mt. Mansfield this Court was willing to uphold the then untested rule solely on the basis of the FCC's predictions and petitioners' promises that it would increase program diversity for viewers and decrease network dominance, the FCC's present findings and the exhaustive 150-page report of its Communications Economist* -- as well as petitioners' own concessions and conduct -- demonstrate that the rule has in fact frustrated those purposes. Based on that record, the entire rule (with or without modifications) can no longer survive under the required re-application of the First Amendment and public interest standards adopted in Mt. Mansfield.

In summary, petitioners ask for continuation of a rule that, by their own admissions, has been counterproductive and oppose those FCC changes designed to relax the rule to a limited degree. We, on the other hand, urge a repeal of the entire rule with all its artificial restraints and a return to fundamental First Amendment and public interest principles, including a free marketplace in which the viewing public is not arbitrarily denied access to the ideas and works of any independent producer.

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* A 164-331.

# I

## NAITPD AND WESTINGHOUSE CONFIRM THAT PTAR HAS FAILED TO MEET ITS OBJECTIVES AND CANNOT SUCCEED

NAITPD's and Westinghouse's behavior over the past three years reinforce the conclusion that PTAR (with or without modifications) has not met and cannot meet its stated objectives. They confirm the showing in our principal brief that PTAR has produced, and will continue to produce, less program diversity and innovation and more network dominance, all contrary to the rule's original goals and to the guiding legal principles recognized in Mt. Mansfield.

### Program Diversity and Innovation

Understandably, NAITPD and Westinghouse do not seek to defend the programming record of PTAR over the past three years. They do not question the FCC's findings that there has been less diversity and less innovation -- namely, a diet of repetitive and stripped old network game shows, cheap foreign imports and other inexpensive fare. Moreover, as we shall show, NAITPD and Westinghouse implicitly concede that this pattern will continue in the future in light of the economic imperatives of syndication distribution under PTAR. For that is all the artificial "access time market" has or can sustain.

(1) Westinghouse, after initially trying to produce six non-game shows costing $40,000 to $60,000* for access periods, totally abandoned such efforts and no longer produces programs for access time** because it found that local stations preferred game shows which cost $5,000 to $10,000 to produce and could be licensed for as little as $300 per episode (A 231, 234-35). Westinghouse's brief is strangely silent about its abandonment of access production, particularly since the FCC (25 FCC 2d 318, 321, n.6, 325) and this Court in Mt. Mansfield (442 F.2d at 483) specifically relied on Westinghouse's promises to provide diverse and new programs for access periods.

(2) NAITPD's original founder (Winters/Rosen Productions) also initially produced several non-game shows for access.*** But, when stations preferred to maximize profits by licensing cheap game shows, it too discontinued access production and left NAITPD

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* SA 1. All references to "SA", followed by appropriate page numbers, refer to our Supplemental Appendix filed in connection with this brief.

** A 53-54; also see Report and Order, Appendix D, p. 11.

*** See NAITP's Principal Comments before FCC, January 15, 1973, pp. 54, 57, 59, 90. Also see SA 6-15.

to the control of the champion game entrepreneur, Goodson-Todman.* NAITPD's brief omits mention of Winters/Rosen's ill-fated venture in access production, even though its filings before the FCC were replete with laudatory references to its founder's access programs.**

(3) Time-Life admitted to this Court that for next year local stations, once again, "are about to buy 'tried and true' programming, such as half-hour quiz and game shows, to fill the 'prime time access' period."***

As shown in our principal brief (p. 29), game shows have accelerated their control of access syndicated time since PTAR:

| | |
|---|---|
| 1970-71 (pre-PTAR) | 11% |
| 1971-72 | 23% |
| 1972-73 | 49% |
| 1973-74 | 55% |

In light of these facts, Westinghouse conceded before the FCC that "operational experience of the rule has left

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* See our principal brief, pp. 16-17. Winters/Rosen is no longer a member of NAITPD (see Appendix H to NAITPD's Petition for a Stay in this Court).

** See NAITP's Principal Comments before FCC, January 15, 1973, pp. 52, 54, 57-5[illegible] 67, 68, 73, 75, 84, 86, 90, 91, 182, 183, 188, 190 and Attachment C.

*** Affidavit of Wynn Nathan (p. 7) annexed to Time-Life's Motion to Intervene and for a Stay, March 6, 1974.

something to be desired"* and stated that "if the rule is to be repealed, we believe that it is incumbent on the Commission and the parties to first consider what alternative means should be adopted to deal with the critical problem of network dominance".** Westinghouse also stated:

> "... Such program practices as the stripping of game shows throughout the week result from the decisions of individual licensees to select such programs for broadcast from among the many types of programs which are available in the syndication marketplace -- they are not caused by the unavailability of other types of programs.
>
> "Because of a station preference for well established and proven program ideas, some truly new and innovative programs which have received wide critical acclaim, such as Group W's Norman Corwin Presents and Winter-Rosen's Story Theatre, have not found wide acceptance in syndication. ***
>
> * * *
>
> "Rather than experiment with new and unproven program ideas, stations have found it prudent to maximize their profits over the short run through such practices as stripping game shows of established audience appeal." ****

Petitioners thus agree with the FCC's findings that PTAR has led to a uniform pattern of inexpensive programs,

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* Westinghouse Reply Comments before FCC, March 12, 1973, p. 13.

** Westinghouse Petition for Modification of Issues Specified in Notice of Oral Argument before FCC, June 26, 1973, p. 6.

*** Westinghouse Reply Comments before FCC, March 12, 1973, pp. 14-15.

**** Id. at p. 15.

primarily recreations of old network game shows.* Nor do petitioners dispute the commission's finding that there had been no increase in the number of producers as a result of PTAR ( ¶ 95).** The Commission's Communications Economist, Dr. Pearce, stated:

> "I don't know of a single company that has gone into business as a result of the Rule."(SA 3)***

Network Dominance

Petitioners' briefs also support the demonstration in our principal brief (pp. 33-40) and the conclusions of the FCC's Communications Economist**** that PTAR has failed to accomplish its second predicted goal -- namely, a decrease in network dominance.

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* For a summary of the FCC's findings on this point, see our principal brief, pp. 19-25.

** Also see our principal brief in our appeal, p. 25.

*** Dr. Pearce also concluded (A 171):
"Many of the independent production companies selling programs for the prime-time access periods were in daytime and prime-time production long before the prime-time access rule was passed. There has been a substantial shift, however, away from independent producers of network quality programming (larger budget dramas and comedies) to taped game shows and imported film programs. In fact, were the rule to be abolished, very few would actually cease production. Producers would move, instead, into different daytime periods, remain in prime-time if they had a successful and proven prime-time access program, or attempt to meet the growing programming demand by independent stations."

**** A 167-69, 177-78, 181, 194, 201-02, 206-07, 211, 244-45.

Petitioners do not deny that the networks have grown more dominant in the 8-11 P.M. time period because PTAR has created an artificial scarcity of network prime time. That increase in dominance explains why two networks (ABC and NBC) switched from opposing to supporting the original rule. Those networks found, as shown by the Commission's Communications Economist, that the artificial scarcity in network time increased their ability to raise rates to advertisers and strengthened their leverage in dealing with program suppliers who had to compete for a smaller number of available network prime time slots.*

Nor do petitioners deny that, as shown in our principal brief (pp. 36-39), the networks have remained dominant from 7-8 P.M. -- the so-called "access time" -- controlling what will or will not be programmed in this period throughout the nation by virtue of the fact that they each own five stations in key markets which are indispensable for any syndicated access producer. NAPTPD frankly admitted this before this Court in its Petition for a Stay.

> "[T]he primary sale for any new [access] show is to network owned and operated stations (O & O's), which account for almost half of the expected gross revenue of an access show. In effect, they underwrite the costs, and profits do not even begin until some time later." (p. 14)

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* A 167-68, 169, 203, 204, 206, 207, 211.

NAITPD member Filmways stated to this Court:*

> "Normally sale to network owned and operated stations, which are located in the largest markets, represents the principal financial support for first run syndication program material, generally about 50% of gross revenues ...."

In a similar vein, intervenor Time-Life recently told the FCC:**

> "As is detailed in the February 18, 1974 issue of 'Broadcasting' (page 27), it is very important to the sale success of any syndicated series for a syndicator to be able to sell his product to one of the major market stations, preferably one of the network-owned and operated stations."

These statements are wholly consistent with the conclusion of the Commission's Communications Economist that "a program stands little chance of being successful in syndication unless the network's five owned and operated stations buy it" (A 169). Petitioners thus agree that network dominance continues despite PTAR; and their agreement totally undermines the FCC's contrary conclusions (¶ 97), made without record support or factual findings.

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* NAITPD Petition for a Stay, February 28, 1974, Appendix L. Also see statement of NAITPD member Firestone, Appendix J.

** Comments In Support of NAITPD's Petition for a Stay before FCC, February 21, 1974, p. 6, n.5.

In summary, petitioners -- both by their statements and their conduct -- show that PTAR has failed to achieve its two predicted goals (an increase in program diversity and a decrease in network dominance) which were the basis for this Court's decision in Mt. Mansfield. The failure of those predictions, the keystone to Mt. Mansfield, dooms the rule when this Court re-applies controlling Constitutional principles in the light of experience instead of predictions.

## II

## PETITIONERS' CONDUCT BELIES THEIR CLAIM AND THE FCC'S CONCLUSION THAT PTAR HAS NOT HAD A FAIR TEST

NAITPD and Westinghouse, in opposing total repeal of PTAR, seek refuge in the FCC's unsupported conclusion (¶ 89) that three years is not a sufficient test "at least in the sense that the somewhat mediocre showing so far can be regarded as showing that nothing different is to be expected in the future." But petitioners had three years to produce diverse and innovative quality programs for access time -- if the economics of syndication distribution under PTAR would have supported such programming. They did not do so because the economics simply would not permit it. If they were unable to keep their original promises because of the economic structure of the "access syndication market", what reason is there to believe that they will do so in the future? Indeed, it is clear that the rule's main proponents will not even make the attempt because they have already abandoned the field after reaching a reasoned business decision that they in fact had had a "fair test".

(1) Westinghouse's management concluded that it had "a fair test" after one year of operations under the rule. As shown above, after producing six non-game shows in the first access year, Westinghouse found that stations preferred to

maximize profits by licensing the less expensive game shows. So Westinghouse ceased access production.

Although Westinghouse's executives concluded that one year was a "fair test" for its stockholders, they apparently believe that the public should continue to be subjected to access fare, no doubt because they find PTAR profitable for their five large stations.*

Two years ago, in opposing the institution of the instant rule-making proceeding, Westinghouse stated that there are "many new and innovative series from producers new to prime time including Group W (The David Frost Review, Norman Corwin Presents, Doctor in the House), Metromedia (Primus), and Winters-Rosen (Rollin' on the River and Story Theatre).** The FCC repeated this list in its current Notice of Rule Making (¶ 6) (JA 4). But every one of those shows failed in the first or second year of PTAR because local stations could pay less for, and run more commercials on, the game shows and other low quality access show. This again shows that PTAR had a "fair test".

(2) NAITPD's original founder, Winters/Rosen Productions, concluded that it too had given PTAR a "fair test" after

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* The Commissions Communications Economist found that "[m]ost stations in the top - 50 markets ... presently favor it [PTAR] because it enables them to make greater profits" (A 170). Also see A 53-54.

** Westinghouse Opposition to Petition for Rule Making before FCC, June 12, 1972, pp. 3-4, n.1.

one or two years. As noted above, it had produced several non-game shows for access time and believed them to be of high quality.* But once again, the economic structure of the "access syndication market" did not support those ventures in competition with game shows and other inexpensive fare. After its "fair test", Winters/Rosen made a business judgment to abandon all production of access shows and quit NAITPD.

(3) NAITPD's new leading members -- Goodson-Todman (the champion game show producer) and Firestone (the most successful distributor of game shows) have surely had "a fair test". In 1970, they promised the Commission that they would produce new and diverse programs if PTARwere passed (A 158-61). But in the ensuing four years, they merely continued to produce and distribute the same old game shows. The only difference is that such shows now occupy a great deal more air-time.**

(4) NAITPD member Metromedia also had a "fair test". Its two non-game access shows (Primus and Dusty's Trails) each lasted one season, whereas its much less expensive access game show (Truth or Consequences) continues occupying more access time than any other program except another old game show.***

The Commission (25 FCC 2d 318, 321-25), and in turn this Court in Mt. Mansfield (422 F.2d at 483), placed great reliance on the promises for diverse and innovative programs from Westinghouse and NAITPD members. Why should this Court, in re-examining

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* See NAITPD's Principal Comments before FCC, January 15, 1973, pp. 52,54, 57-59, 67, 68, 73, 75, 84, 86, 90, 91, 182, 183, 188 190. Also see SA 6-15.

** See our principal brief, pp. 16-17, 24 and 25.

*** See our principal brief pp. 31-32

PTAR now, uphold the rule on the basis of the old pie-in-the-sky promises -- particularly since the Commission itself now refuses to make new predictions that the rule will lead to more diversified and innovative programming?*

In its current brief (p. 6), Westinghouse states that three years after the FCC banned option time it recognized that the ban was ineffective and resubmitted its earlier proposal for PTAR. If three years were a "fair test" for the option time rule, why is it not a sufficient period for PTAR? Why should the public continue to be a guinea pig for more testing?

In short, petitioners' own conduct shows that PTAR has had "a fair test" and that the economic structure of "access syndication" cannot produce diverse and innovative programs.

This Court in Mt. Mansfield agreed with the Commission's view that a final determination of PTAR's success in achieving its objectives would require "some operational experience under competitive conditions." (440 F.2d 470, 483, n.42, emphasis added) More than "some" operational experience under competitive conditions has now been observed since PTAR was adopted in 1970. No one claims its objectives have been achieved or even furthered. No one denies that the evils it sought to correct have worsened. No one claims that the public's interest or its access to television has been served.

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* See our principal brief, pp. 30-1.

If "time alone can decide their success or failure" (NBC v. U.S., 47 F. Supp. 940, 946 (S.D.N.Y. 1942, Judge L. Hand), affirmed, 319 U.S. 190 (1943), cited in Westinghouse's Mt. Mansfield brief at p. 40), then time has decided PTAR's failure. The minor modifications adopted in the Report and Order, as discussed below, are too insignificant to alter this record; indeed, some of them will in fact worsen the situation (such as turning the limited ban on feature films into a total ban). In short, PTAR's objectives cannot be achieved by the PTAR approach; the Commission's interference with the public's access to programs can no longer be justified on the assumption that they will; and PTAR must be set aside as the FCC explores the alternative solution it has thus far refused to consider.

## III

## THE ISSUE IS THE COMMISSION'S DECISION TO CONTINUE PTAR, NOT ITS MINOR MODIFICATIONS

Having failed to demonstrate that their past broken promises are now entitled to credibility sufficient to warrant a continuation of PTAR, petitioners instead object to certain of the modifications which the Commission made in the rule. But petitioners cannot properly single out isolated portions of a package rule. The FCC clearly would not have continued this counter-productive rule without these changes, and they are an integral part of an over-all rule that cannot be dissected bit-by-bit.

More important, as shown in our principal brief, the modifications -- without which the Commission would have repealed the rule -- cannot cure its basic deficiencies. While lifting the rule's artificial restrictions on Sunday night and in the first half hour of the access period will ameliorate some public harm, there will still be injury to viewers in the important time periods subject to the rule -- less diversity of programs and a continuance of network dominance.

Petitioners, ignoring the key decision to continue PTAR, focus on the modifications, claiming that they are major surgery and constitute a de facto repeal of the rule. Those claims are belied by the facts, which show that the changes to which

petitioners object are, as the Commission observed, "not great" (¶ 116).

Network Time

The changes, as noted, lift restrictions on Sunday and from 7-7:30 P.M. on other days. Westinghouse boldly asserts (p. 29), without a shred of evidence: "It appears they [the networks] will program more hours now than they did before" adoption of PTAR. But the networks have never programmed in the 7-7:30 P.M. time slot on weekdays, and Westinghouse cites no evidence that this will change.* To do so would require the networks (a) to oust the network evening news shows now shown during that time period in several major markets; (b) to contradict all industry practice and economics by attempting to program from 7-7:30 P.M. and 8-11 P.M. with an unprecedented half hour interruption in network flow to allow for the locally scheduled access time programs;** and (3) to voluntarily re-expand the contracted

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* Indeed NAITP itself has recognized in its Reply Comments before the FCC (p. 13):
"Traditionally, 7:00-7:30 has not been programmed by the networks and except on stations delaying the network news, the time period has been filled by off-network reruns and syndicated programs."

** The networks and their national advertisers require a continuous schedule which will assure audience flow. Thus, for example, an advertiser buying a commercial message to reach a large national audience is obviously extremely concerned about the strength of the preceding programming because it will assure a high degree of audience continuity into the program which follows.

market made possible by PTAR which has had sufficient economic benefits for at least two of the three networks to cause them to switch from being opponents to proponents of PTAR.

To the extent that the rule lifts restrictions on Sunday night and permits stations to use one of the six 7:30-8 PM access time slots on other nights for network public affairs, documentaries or children's programs once a week, the networks may utilize all or a portion of this additional one and one-half hour. While it is impossible at this point to be certain of the precise amount of additional network programming, it will be relatively small in comparison to petitioners' exaggerated claims. The following table sets forth the amount of actual network prime time programming before PTAR; the amount of such programming for the past three years under PTAR; and the amount of network prime time programming likely to occur under the modified rule based upon currently announced plans. As this table indicates, the modifications will add at most less than 7.2% to the network programming time which existed under the old PTAR, a far cry from petitioners' claims.

Actual Metwork Prime Time
(7 P.M.-11 P.M.) Programming Patterns

| | Before PTAR | Under PTAR | Under Modified PTAR (as thus far announced) | Effective Decrease in Access Time as result of Modifications |
|---|---|---|---|---|
| Mon-Fri. | 7:30-11 | 8-11 | 8-11 | 0 |
| Sat. | 7:30-11 | 8-11 | 7:30-11 (approx.)* | 1/2 hr. (approx.)* |
| Sun. | 7-11 | 7:30-10:30 | 7-11** | 1 hr.** |
| TOTAL | 25 hrs. | 21 hrs. | 22-1/2 hrs. | 1-1/2 hrs. |

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* All three networks have announced plans for some use of the 7 or 7:30-8 PM time slot on Saturday night, otherwise a local station access time, for the kind of documentaries, public affairs and children's specials permitted as an exception one night a week under the modifications. CBS has announced plans for a 7:30-8 PM children's special seven weeks out of eight. NBC has announced plans for a 7-8 PM public affairs program six weeks out of eight. And ABC has announced plans for a 7-8 PM children's special six times in the 1974-75 season, presumably an average of about one week out of eight.

** NBC and CBS have announced that they will program Sundays from 7 to 11 PM. ABC has not yet announced its plans.

Non-Network Time

The original PTAR, in practice, covered the 7-8 P.M. time period. The Commission, as noted above, has lifted the rule's restrictions from 7-7:30 and specified that PTAR shall continue from 7:30 to 8 P.M. This modification, contrary to petitioners' claims, will not shut them out of any time period or effect what they describe as a drastic change.

In the earlier half hour (7-7:30), the only effect will be that petitioners' syndicated programs, which are basically revivals of old network shows or sixth episodes of current network game shows, will now compete with other forms of programs selected by local stations -- not only with news and local interest shows, but also with episodes of series which were previously telecast by networks (the so-called "off network programs").*

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* The Commission explained its reasoning for opening up access to the 7-7:30 time period to all forms of programming as follows (¶ 79):

"First, as far as Monday-Friday is concerned, the use of this period (7:00-7:30 P.M.) by top-50-market affiliated stations represents singularly little in the way of opportunity for the development of really new syndicated material. This was true before the rule -- when this was 'station time' not used by the networks -- and it has continued to be true, since the basic programming pattern has not changed much except that stripped game shows have increased their share of the time by the elimination of stripped off-network shows such as I Love Lucy and Dragnet. Four of the six stripped game shows now involved -- Truth or Consequences, To Tell the Truth, What's My Line and Beat the Clock -- were shown in this time slot on top-50-market affiliated stations before the rule, although not as much as now ... We do not view a contest between stripped game shows and stripped off-network material as one the Commission can profitably get into."

NAITPD's real complaint is that it wishes to avoid any competition in this half-hour -- hardly a valid public interest plea.

In the subsequent half-hour (7:30-8:00 P.M.), PTAR remains in full effect Monday through Saturday (except that stations may elect to use one of these six time slots each week for a network or off-network program which is a children's program, documentary, or public affairs show). Except to this limited extent, NAITPD's game show entrepreneurs and importers of inexpensive foreign programs will continue to have a competition-free enclave for their wares.

Thus, when petitioners' rhetoric is pierced, what NAITPD is really complaining about is that its members may have to compete with other independent producers and syndicators for the 7-7:30 P.M. time period when the networks will still be excluded. It is difficult to take seriously such anti-competitive and protectionist arguments. Indeed, as shown in our principal brief, the FCC should have removed all of the artificial restraints by repealing PTAR in its entirety.

If the basic thrust of PTAR -- its curb on network programming -- is relatively unchanged by the Report and Order, where is the so-called major surgery?

-- Feature films were banned during access time periods under the original PTAR if they had been

telecast in the market within the prior two years. Feature films are now banned during access time periods under the modified rule regardless of when or whether they had previously been telecast in a market.

-- Discrete episodes of programs previously telecast on a network were banned during access time periods under the original PTAR (but not cheaply replicated episodes of old or current network programs). The ban continues.

-- Exceptions to the original PTAR were granted by the Commission in the form of ad hoc waivers. Exceptions to the modified PTAR are codified by the Commission's promulgation, as part of the rule, of a series of special permissions for certain preferred types of program.

In short, the Report and Order is, for the most part, not a drastic or even substantial change from the old PTAR. As the Commission acknowledged "the changes adopted herein are basically not great" (Report and Order, ¶ 116). The important decision facing the Commission was whether to continue the rule, and it is that decision which fails to meet the necessary statutory and constitutional tests and thus must be set aside.

## IV

## PETITIONERS' CONSTITUTIONAL ARGUMENTS CONFIRM THAT PTAR IN ITS ENTIRETY VIOLATES THE FIRST AMENDMENT

Petitioners' briefs recognize that the "paramount right" under the First Amendment is the public's right to the greatest diversity of ideas and that the Commission may not act as a censor. However, petitioners limit this Constitutional argument to the modifications to PTAR rather than to the basic rule itself. They miss the central issue -- namely, should the rule have been continued at all?

Three years ago, this Court in Mt. Mansfield was willing to permit interference with certain First Amendment rights on the basis of the FCC's predictions and the petitioners' promises that PTAR would lead to more diverse programs and fresh ideas and thus expand the paramount First Amendment rights of viewers. But it is now established by the Commission's own findings -- which petitioners do not dispute -- that the predictions for the rule have not been met and that petitioners have not kept their promises. Thus, the public has been given fewer choices and less innovation. This Court thus must invalidate the rule in its entirety by re-applying the basic Constitutional tests in light of actual experience.

Petitioners' own First Amendment analysis and cries against censorship support the conclusions set forth in our principal brief (pp. 50-63) and in MCA's separate brief that

fundamental First Amendment rights are transgressed by the Commission's new total ban on all feature films; by its continuation of the ban on so-called "off network" programs (particularly while allowing retreads of old network shows and sixth episodes of current network stripped game shows); and by its restriction on the ability of stations to select even independently-produced programs that would otherwise be scheduled by the networks from 7:30-8 P.M.

Westinghouse summarizes basic free speech doctrine when it states (p. 37):

> "The 'give-away' show is as entitled 'to the protection of free speech as the best of literature'. American Broadcasting Co. v. United States, 110 F. Supp. 374, 389 (S.D.N.Y. 1953) (three-judge court) citing Winters v. New York, 333 U.S. 507 (1948), affirmed 347 U.S. 284 (1954)."
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> "Cf. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) where the Court repudiated the view that movies were purely entertainment and beyond the reach of the free speech protection. Professor Kalven notes that the tradition underlying the law's refusal to distinguish between news and entertainment '... perhaps begins back in 1808 with Lord Elleborough's opinion in Carr v. Hood, 1 Campbell 350, 354 (1808).'" Kalven, supra, p. 29.

We fully agree with those statements. They show that the total ban on motion pictures -- which will have the practical effect of preventing locally-scheduled feature films for a major

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* The last paragraph quoted above appears as a footnote in Westinghouse's brief, p. 37.

portion of evening viewing* -- violates the First Amendment. That is also true with respect to the ban on so-called off-network programs and to the restriction on the ability of stations to accept even independently-produced programs from the networks 7:30-8 P.M..

Petitioners' Constitutional arguments, addressed to the so-called "permissive" program exceptions, are far more meaningful and forceful with respect to the mandatory bans of PTAR.** While certain of those restrictions (but not the new total movie ban) were justified in Mt. Mansfield on the premise that PTAR would "open up the media to those whom the First Amendment primarily protects -- the general public" -- and enlarge "the public's ability to receive diverse programming" (442 F.2d 470 at 478), the entire PTAR must fail now that the premise has failed.

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* See our principal brief, pp. 40-41, and MCA's brief, Appendix A.

** For example, while it can be argued that the "permissive" exceptions permit stations to exercise some degree of discretion, the feature film ban flatly prohibits the showing of all films. While the "permissive" exceptions are limited in scope to one-half hour per week, the feature film ban applies every night and, when combined with the basic rule itself, will deprive viewers of movies during substantial portions of the evening on local stations. Moreover, the feature film ban subverts the purpose of the rule by increasing rather than decreasing network dominance.

V

## THE CLAIM THAT THE COMMISSION'S OPINION VIOLATES THE ADMINISTRATIVE PROCEDURE ACT

Petitioners assert that the Commission's Report and Order is not, as required by the Administrative Procedure Act and the Communications Act, supported by adequate findings, or internally consistant, or bolstered by any rational explanation other than an improper attempt to balance the interests of private parties. But, by making these arguments merely as an objection to the modifications of the rule, petitioners again miss the crucial point. These arguments characterize the Report and Order as a whole and its more fundamental decision to continue PTAR with modifications rather than to repeal it in its entirety. As demonstrated in our principal brief, the record, public interest and Constitutional principles compel total repeal.

Nor is this a case where it would be appropriate or necessary for the Court to bow to administrative expertise; for, as petitioners recognize, such expertise was not decisive in this case. On the contrary, considered findings of disinterested experts -- including the comprehensive analysis of the Commission's Communications Economist (A 164-331), the views of its former Chief Counsel,* the recommendation of the Office of

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* See our principal brief, pp. 10-11.

Telecommunications Policy,* and the uniform reaction of the nation's leading television critics** -- all argued for total repeal.

The Commission's decision to continue PTAR in the expectation that it might dilute network dominance is also arbitrary and capricious in light of the clear showing that the rule has had the opposite effect and the Commission's refusal to consider alternative solutions. Westinghouse itself urged that alternative solutions be fully explored. When the FCC issued a Note of Oral Argument last June (JA 34-35) and asked that parties direct their comments to certain specified topics, Westinghouse filed a petition*** for modification of the issues which specified two additional topics for "special consideration in both the oral argument and in further written submissions". One of those topics was stated as follows (p. 2):

> "If the rule is repealed, what alternatives should be considered to deal with the effects of network dominance which were found to exist in Docket 12782?"

Westinghouse added that "if the rule is repealed, we believe that it is incumbent on the Commission and the parties to first

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* Id., p. 9.

** Id., pp. 22-23. Also see analysis of PTAR's negative effects on viewers in TV Guide, January 27, 1973, SA 2-5.

*** Petition of Westinghouse dated June 26, 1973.

consider what alternative means should be adopted to deal with the critical problem of network dominance" and that "the addition of this topic ... for oral argument should be a matter of highest priority" (p. 6). Finally, Westinghouse stated (p. 7):

> "We fail to see how the Commission could consider the repeal of an essential element of this comprehensive scheme without considering or even hearing suggestions on alternatives to preserve the vitality of its overall regulatory plan."

But the Commission failed to heed this advice and its present Report and Order shows a total failure to consider alternative solutions which had been urged by Chairman Burch (SA 24-29), Commissioner Johnson (SA 16-23), its own Communications Economist (SA 30-34), the Office of Telecommunications Policy, and others.

As noted in our principal brief (pp. 67-68), this Court in Scenic Hudson Preservation Conf. v. Federal Power Com'n, 354 F.2d 608 (2d Cir. 1965), cert. denied, 384 U.S. 941 (1966), reversed the action of another administrative agency precisely because it had failed to consider alternative solutions to the problem before it. It should follow that precedent here.

## Conclusion

For all of the foregoing reasons, we respectfully request that the instant petitions be denied and that the prime time access rule be set aside in its entirety.

Respectfully submitted,

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Dated: New York, N. Y.
April 1, 1974

Westinghouse Broadcasting Company, Inc.) Case No. 74-1283
)
v. )
)
Federal Communications Commission )

Affidavit of Service

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

EDWARD SUTTON, being duly sworn, deposes and says:

1. That he is over the age of 18 years, resides in the State of New York and is not a party to the action.

2. That on the 1st day of April, 1974, he served:

a. Motion for Leave to Intervene on Behalf of Samuel Goldwyn Productions;

b. Motion for Leave to Intervene on Behalf of National Committee of Independent Television Producers;

c. Answering Brief of Intervenors National Committee of Independent Television Producers, Samuel Goldwyn Productions, Warner Bros., Inc., Columbia Pictures Industries, Inc., and MCA, Inc.;

d. Supplementary Appendix of Intervenors listed in c above.

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Said service was made by depositing a true copy of each document enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

Edward Sutton

Edward Sutton

Sworn to before me this
2nd day of April, 1974.

Clara A. Lauro

CLARA A. LAURO
Notary Public, State of New York
No. 30-7443100
Qualified in Nassau County
Certificate filed in New York County
Commission Expires March 30, 1976